

Summary

The Commission should apply the new rules regarding construction permits to existing permittees within their initial construction permit only and grandfather existing construction permits beyond their initial construction period under the current rules. Application of the new rules to permittees beyond their initial construction period is contrary to the Commission's stated goals of the proceeding, impermissibly retroactive, arbitrary and capricious, and contrary to the public interest. Service to many communities will be disrupted or delayed by the application of the new rules to permittees beyond their initial construction period. Administrative gains, such as the reduction of paperwork, can be achieved by forward looking application and grandfathering older permits. The Commission's goals are best served by application of the new rules only to those permits within their initial construction period and grandfathering permits beyond their initial construction period.

The tolling provisions of the new rules must be revised to deter frivolous filings against applications and to coincide with the realities of local zoning and other regulatory burdens. Specific events such as the filing of an opposition to a modification application are properly included as tolling events. These provisions must also be revised to reduce, not increase, the reporting burden on permittees and the administrative burden on Commission resources. The Commission's goal of reduction of administrative burdens and paperwork are best served by the reporting of tolling events prior to expiration of the permit, not at the onset of a tolling event.

Finally, a stay of the effective date of the new rules is properly granted. Without the stay many construction permits will be automatically canceled. Maintenance of the *status quo* pending reconsideration is in the public interest.

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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

1998 Biennial Regulatory Review
Streamlining of Mass Media
Applications, Rules and
Processes

MM Docket 98-43

To the Commission:

Petition for Reconsideration

A. Introduction

1. Z-Spanish Media Corporation, Knox Broadcasting Group, Inc., Jersey Shore Broadcasting Corporation, Concord Ventures Limited, National Minority T.V., Inc., and Pegasus Broadcast Television, Inc. (collectively, "Petitioners") by counsel and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, hereby petition the Commission for Reconsideration of its Report and Order in the above-referenced proceeding.¹ Petitioners request that the Commission reconsider Section D of the Streamlining Order, "Modifying Construction Permit Extension Procedures," and take the following actions: 1) adopt the proposal put forth in the *NPRM* applying the three year construction period to those permits currently within their initial construction period, 2) modify the tolling provisions of proposed Section 73.3598 to allow for tolling of the construction period under additional limited circumstances, 3) modify the

¹*Notice of Proposed Rulemaking in the Biennial Review -- Streamlining of the Mass Media Applications, Rules, and Processes*, 13 FCC Rcd. 11349 (1998) (hereinafter "*NPRM*"); *In the Matter of 1998 Biennial Regulatory Review -- Streamlining of Mass Media Applications, Rules and Processes*, MM Docket 98-43, FCC 98-281, released November 25, 1998 ("*Streamlining Order*").

tolling procedures to reduce administrative burdens on the resources of permittees and the Commission, and 4) impose a stay on the effective date of the amended rules pending reconsideration.

B. Procedural Matters

I. Standing

2. Section 1.429(a) of the Commission's Rules, 47 C.F.R. § 1.429(a), allows "any interested person" to file a Petition for Reconsideration of a final action taken in a rulemaking proceeding. The *Streamlining Order* is a final action, as the rulemaking proceeding was terminated by the order.² Petitioners each hold construction permits for broadcast facilities issued by the Commission.³ As permittees, Petitioners are interested in the specific rule changes adopted in the *Streamlining Order* and are directly affected by these changes. Thus, Petitioners have standing to seek reconsideration of the *Streamlining Order* and do so herein.

II. Timeliness

3. Petitions for Reconsideration of a final action by the Commission in a rulemaking proceeding must be filed within 30 days of the date of public notice of the action. 47 C.F.R. §§ 1.429(d) and 1.4(b). Public Notice of the *Streamlining Order* was announced by publication in the Federal Register on December 18, 1998.⁴ Thus, petitions for reconsideration must be filed with the Commission on or before January 19, 1999. This petition is timely filed.

² *Streamlining Order* at ¶ 111, *see also* footnote 1, *supra*.

³ Petitioners, directly or through subsidiary companies, are all Commission permittees, and in some cases, also Commission licensees.

⁴ 63 Fed. Reg. 70040 (December 18, 1998).

C. Discussion

- I. The Commission should apply the new rules only to existing permits within their initial construction period, and grandfather existing permits beyond the initial construction period.
 - a. Application of the new rules to existing permits within the initial construction period while grandfathering existing permits beyond their initial construction period achieves the Commission's stated goals, without the unfairness caused by retroactive application.

4. Petitioners request that the Commission reconsider its decision to apply the proposed rule to all permittees. Instead, the Commission should adopt the proposal articulated in the *NPRM* to apply the new rules only to those permits within their initial construction period,⁵ while continuing to apply the current rules and continue their application to those existing permits beyond their initial construction period.⁶

5. The Commission's stated goal in this proceeding is to "substantially reduce paperwork and administrative burdens on permittees and the number of requests for additional time to construct while promoting the expeditious construction of stations"⁷ This goal would be accomplished by applying the new rule only to future permittees and existing permittees within their initial construction period. The goal of reducing paper work and administrative burdens would be achieved by eliminating the need to consider extension applications for most existing permittees, and for all new permittees in the future. The Commission's second goal of

⁵ *Streamlining Order* at ¶ 84. "Within their initial construction period" includes those permittees who have timely filed first extension requests that are currently pending before the Commission.

⁶ Petitioners propose that permittees beyond their initial construction period be grandfathered under the old rules, Sections 73.3534, 73.3598, and 73.3599. It would be expected that applications for extension of these permits would be liberally granted to ensure that all applicants had at least three unencumbered years to construct regardless of "good cause." Of course, those that have had three unencumbered years to construct would have to meet the standards of the one-in-three showing of Section 73.3534.

⁷ *Streamlining Order* at ¶ 79.

promoting expeditious construction of stations is advanced by allowing those permittees who have conducted themselves in reliance on the existing rules to bring their projects to fruition and initiate service to the community⁸. Applying the new rules to this class of existing older permittees would result in the immediate cancellation of many permits, delaying construction of new stations and service to their communities.

6. Grandfathering permittees beyond their initial construction period allows for an orderly transition from the old to the new rules while treating all permittees equitably, conserving Commission resources and promoting the expeditious construction of stations. Consider the following example: One of the Petitioners' permits is subject to automatic cancellation upon the effective date of the new rules because there had already been more than three unencumbered years to construct the facility *before* this Petitioner purchased the permit. Thus, despite any actions taken by this permittee, the new rules result in an automatic cancellation because of the prior permittee's inaction. The Petitioner could not have known at the time they purchased the permit that the Commission's rules would change in such a dramatic fashion. Similarly, another petitioner received a permit for changes in its licensed station, almost three years ago. Because of problems with local environmental groups, it was not able to construct at its permitted site, but, after a diligent search and a modification application delayed by FAA issues, it received a modified permit. If this modified permit relates back to the grant date of the initial permit, this petitioner will simply not have enough time to complete its construction of a 2000 foot tower. Had it known that the new rules would apply to this situation, instead of filing for a modified permit, it would have sought cancellation of the original permit, then filed for the new site as a

⁸ In fact, in the case of LPTV permits, many are already serving the community. See paragraphs 9-11, *infra*.

new permit -- giving it a full three years to construct. The retroactive application of the new rules to situations such as these simply does not promote the expeditious provision of service to the public. Nor does it conserve Commission resources, as it will foster litigation and ultimately result in repetitive filings.

- b. The application of the three year construction period to permittees holding permits initially issued more than three years ago is a retroactive application of a new rule and violates the Administrative Procedure Act.

7. The application of the new rules to permits granted more than three years prior to the effective date is impermissible. Rules adopted pursuant to notice and comment rulemakings may be given prospective effect only. *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240 (D.C.Cir. 1997) (“*Chadmoore*”).⁹ Retroactive application of agency rules adopted pursuant to rulemaking is barred by the Administrative Procedure Act, 5 U.S.C. § 553.¹⁰ The revisions to the Commission’s Rules were adopted in the course of a formal notice and comment rulemaking.¹¹ Thus, retroactive application of the rules adopted therein is barred. Application of a rule is retroactive where it “impair[s] rights a party possessed when he acted, increase[s] a party’s liability for past conduct, or impose[s] new duties with respect to transactions already completed.” *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994), *See also DIRECTV, Inc. v. FCC*, 110 F.3d 816, 825-26 (D.C.Cir. 1997); *Chadmoore* at 240-241.

8. The application of proposed Section 73.3598 to permittees who have held their

⁹*See also Georgetown University Hospital v. Bowen*, 821 F.2d 750, 757 (D.C.Cir 1987), *aff’d on other grounds, Bowen V. Georgetown University Hospital*, 488 U.S. 204 (1998) (“*Bowen*”); *Bowen*, 488 U.S. at 216 (Scalia, J., concurring).

¹⁰ Rules or policies adopted in adjudications, as opposed to rulemakings, under certain circumstances, may have retroactive application. *Contrast Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737 (D.C.Cir. 1986)(retroactive application of a new policy or rule is permissible in the course of an agency adjudication where the agency explains its balancing of the benefits and harms associated with its retroactivity). *See also Chadmoore* at 240-241.

¹¹ *See* footnote 1, *supra*.

construction permits for more than three years is retroactive. The changes in the rules not only impair these permittees' rights to construct their authorized facilities, but also increase the liability for the past conduct of these permittees. The cancellation of construction permits issued more than three years before the effective date of the new rules imposes the severest of liabilities -- forfeiture of the permit. It also imposes new duties on transactions already completed -- as applicants have bought permits or made construction plans in reliance on existing extension standards. These transactions may very well not have been undertaken had the new rules been known. The severe retroactive effect cannot stand under the Administrative Procedure Act.

c. The New Rates Are Particularly Injurious to Low Power Television Permittees

9. The result is particularly draconian with respect to Low Power Television and TV translator ("LPTV") permittees. The Commission has barred LPTV permittees from filing applications for major modification of their facilities for many years due to the infrequent filing windows for LPTV major modification applications.¹² The last LPTV window opened in May 1996 -- almost a full three years ago. Many permittees, unable to construct their authorized facilities, have, with the Commission's blessing, operated with these modified facilities pursuant to Special Temporary Authority ("STA") pending Commission action opening a filing window

¹² *Low Power Television Service (Filing Windows)*, 102 FCC 2d 295, 57 RR 2d 234 (1984) (Report and Order instituting the use of filing windows); *Public Notice, Notice of Limited Low Power Television/Television Translator Filing Window From April 29, 1991, Through May 3, 1991*, Mimeo No. 12124 (released March 12, 1991) (No new low power applications in major urban markets); *Notice of Limited Low Power Television/Television Translator Filing Window From April 1, 1994 through April 15, 1994*, Public Notice No. 41954 (MMB Mar. 3, 1994) (Window for major modifications and new permits in areas 100 miles beyond major urban markets); *Public Notice, Notice of Limited Low Power Television/Television Translator "Major Change Only" Filing Window From April 22, 1996 through April 26, 1996*, Mimeo No. 62033, 61 Fed. Reg. 11840, published March 22, 1996. (Window for major changes only, no new construction permits); *Public Notice, Notice of Extension of Low Power Television/ Television Translator "Major Change Only" Filing Window*, Mimeo No. 62397, released April 10, 1996 (Extending window for major change applications until May 17, 1996). The last window filing for major change applications closed on May 17, 1996.

allowing the modification application. In many cases, while these stations are operating, they cannot file for a license until the next LPTV filing window opens, and which will allow them to amend their underlying authorizations to specify their operational facilities. In many cases, the current underlying authorizations are over three years old. Thus, upon enactment of the new rules, service to their communities will be terminated by cancellation of the underlying permits.

10. Such permittees have thus been prevented from filing an application for license to cover their construction permit. They await Commission action opening a filing window. The Commission's own actions imposing the practical freeze on the filing of applications and granting the STAs to operate at locations different from the authorized facilities have created an untenable situation for these permittees. These LPTV permittees have constructed and are operating their stations and serving their communities, yet their permits could now be canceled under a strict reading of the new rules.¹³ Thus, the Commission is imposing a severe penalty on the LPTV permittees for actions taken with the Commission's knowledge and approval.

11. The revision of Sections 73.3534 and 73.3598 creates liability for past conduct. The permittees were unable to construct their authorized facilities within the three year period. Relying on the Commission's Rules and believing that their circumstances met the existing criteria for extension of the permit, these permittees expended considerable time, money and other resources toward constructing the facilities and initiating service to their community. If the permittees were aware that automatic cancellation was imminent, they could have (and would have) taken different action. In the most base terms, the Commission is imposing the most stringent of penalties because the permittees did not conduct their business in a manner to

¹³ The severity of the Commission's action is exacerbated by the fact that many LPTV permittees have displacement applications pending with the Commission pursuant to the FCC's DTV proceeding. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order in MM Docket 87-268, 12 FCC Rcd. 14588, 14653-54 (1997); See also *Public Notice, Commission Postpones Initial Date for Filing TV Translator and Low Power TV Applications for Displacement Channels*, Mimeo No. 82914, released April 16, 1998. Displacement applications do not appear to fall within the definition of tolling events in the new rules. Reconsideration of the definition of tolling events is discussed *infra* at Paragraphs 16-21.

comport with a rule that did not exist and which the permittees could not have anticipated.¹⁴

Such retroactive application of the new rules cannot be permitted.

- d. The application of the three year construction period to permittees holding permits initially issued more than three years ago is arbitrary and capricious and contrary to the public interest.

12. The Administrative Procedure Act requires that agency action not be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “An agency acts arbitrarily and capriciously if it ‘entirely failed to consider an important aspect of the problem’ or ‘offered an explanation that runs counter to the evidence before the agency.’” *California v. FCC*, 75 F.3d 1350, 1358 (9th Cir), *cert. denied*, 116 S Ct 1841 (1996) *citing Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto Ins. Co.*, 463 US 29, 43-44 (1983). In other words, an agency must “offer a reasoned explanation that is supported by the record.” *AT&T v. FCC*, 974 F.2d 1351, 1354 (D.C.Cir. 1992). “A rule that upsets expectations, ... may be sustained ‘if it is reasonable,’ i.e., if it is not ‘arbitrary’ or ‘capricious’” *DIRECTV, Inc. v. FCC*, *supra*, at 826 (internal citations omitted). The Commission has not provided a reasoned explanation supported by the record of the proceeding for its application of the proposed changes in 47 C.F.R. §§ 73.3598 and 73.3534 and the deletion of 47 C.F.R. §§ 73.3535 and 73.3599 with respect to permittees beyond their initial construction period.

13. The *NPRM* proposed to apply the new rules for construction permits to new permits and those existing permits within their initial construction period.¹⁵ The Commission notes that one commentor agreed with its tentative conclusion that the new rules be applied only to permits

¹⁴ Unlike cases where the Commission and the courts have found that the filing of an application did not create a right that was impaired by a new rule and thus was not retroactive, *see, for example, Hispanic Information and Telecommunications Network v. FCC*, 865 F.2d 1289, 1294-95 (D.C. Cir. 1989), here permittees are facing cancellation of their permits as a result of their action and reliance on the Commission’s rules.

¹⁵ *NPRM* at ¶ 59.

granted after a date certain.¹⁶ No comments filed in response to the *NPRM* proposed or supported application to all existing permits.¹⁷ Notwithstanding the tentative conclusion in the *NPRM* and wholly without record evidence to support such a broad application, the *Streamlining Order* concludes that the three year period of construction should apply to all permittees. The Commission fails to justify or explain its conclusion that application to all permittees would be “fairer.”¹⁸ In fact, such retroactive application is the height of unfairness -- as these applicants have spent money and time pursuing the construction of permits based on one set of Commission created expectations -- expectations which have now been shattered by the new rules.

14. The Commission has summarily concluded that “a three-year construction period would provide all permittees with an adequate and realistic time to construct.”¹⁹ The Commission acknowledges but does not consider the “anecdotal”²⁰ comments demonstrating that difficulties with local zoning authorities alone can prevent a permittee from constructing for many years.²¹ The Commission also fails to consider the number of permits granted well over three years ago which it has extended and which are currently authorized.²² The mere existence of such permits, including those of Petitioners, contradicts its conclusion that three years is an “adequate and realistic” construction period for “all permittees.” If these permittees had known that they had a

¹⁶ *Streamlining Order*, at footnote 147.

¹⁷ Some commentators did propose application of the new rule to all outstanding authorizations that have had less than three years to construct. *NPRM* at ¶ 82.

¹⁸ *Streamlining Order* at ¶ 84.

¹⁹ *Streamlining Order* at 83.

²⁰ The use of the term “anecdotal” denotes the Commission’s lack of serious consideration of the very real problems encountered by Commission permittees with local zoning and other non-FCC requirements. Additional “anecdotal” evidence of permittee real-life difficulties is recounted herein for the Commission’s consideration.

²¹ *Streamlining Order* at 82, footnote 144. *See also* Paragraphs 16-21, *infra* regarding tolling based on zoning difficulties.

²² *See Streamlining Order* at ¶ 79.

flat three years to construct -- with no hope of an extension -- they would have acted differently. But since they did not know that this rule would be adopted and retroactively applied, they should not now be penalized for not having taken different actions years ago. The Commission did not articulate nor did it consider the detrimental effect on the public interest that application of the new rule to all permittees would cause. Thus, the Commission's application of the new three year construction period in Section 73.3598 to existing permittees who have held their permits for more than three years is arbitrary and capricious and contrary to the Administrative Procedure Act.

15. The public interest and the Commission's stated goals, in addition to the Administrative Procedure Act, compel reconsideration of the application of the new rules to permittees beyond their initial construction period. Petitioners request that the Commission adopt the proposal as originally articulated in the *NPRM* to apply the new rules only to those permits within their initial construction period and request that the Commission grandfather the remaining permits under the current rules and continue their application to those existing permits beyond their initial construction period.²³

II. The tolling provisions of revised Section 73.3598(b) must be revised.

16. The Commission's new rule provides that permittees may toll the running of the three year construction period only when:

the grant of the permit is the subject of administrative or judicial review (i.e., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon), or construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local,

²³ See Footnote 5, *supra*. Petitioners propose that permittees beyond their initial construction period be grandfathered under the old rules, Sections 73.3534, 73.3598, and 73.3599. It would be expected that applications for extension of these permits would be liberally granted to ensure that all applicants had at least three unencumbered years to construct regardless of "good cause." Of course, those that have already had three unencumbered years to construct would have to meet the standards of the one-in-three showing of 73.3534.

state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement.

47 C.F.R. § 73.3598(b)(ii)(proposed). The two categories of tolling events under 73.3598(b)(ii) are a) administrative or judicial review of the grant of the construction permit and b) judicial proceedings related to local, state or federal requirements for construction or operation of the facility. Each of these categories presents its own array of issues which must be addressed on reconsideration.

17. The first category of tolling events, administrative or judicial review of the grant of a construction permit, presents extreme difficulties for existing permittees. The text of the proposed rule states that tolling can occur only where the *grant of the permit* is the subject of administrative or judicial review. Ancillary issues -- such as the filing of a petition to deny or objection to a modification application or an assignment application -- which can delay Commission action for many years, cannot be the basis of tolling under the literal meaning of the proposed rule. Thus, no permittee can rely on its own actions to ensure construction within the given period. For example: Under the proposed rule, a permittee may find it necessary to modify its construction permit. That permittee seeks a modification knowing that the applications will not toll the construction period. To his dismay, a third party files an informal objection to the modification application. That permittee must now wait for Commission action and pray that the delay caused by the objection will not consume the remainder of his construction period. The potential for abuse is rampant.

18. The second prong of the tolling provision, pending court actions related to local, state or federal requirements for construction or operation of the station, is even more vexing. The rule, as written, allows tolling only when an action has gone so far as to be in a court. Years can pass appealing local zoning decisions, building permit decisions or environmental permits before such issues are ripe for judicial review.

19. For example, it took one of the Petitioners from March 1993 to December of 1995 to secure a conditional use permit for his tower site. Following issuance of this permit, the

permittee was required to apply for a building permit. Due to disputes between two local building authorities, an additional twenty-one months passed before the building permit was issued in December of 1997. Finally, legally able to construct at the tower site, a neighbor to the site appealed both the building permit and conditional use permit with the county hearing examiner in January 1998. The hearing examiner upheld both permits. The hearing examiner's decision was appealed in March 1998 to the county council. When the county council upheld the permits, that decision was appealed to the county Superior Court in September 1998. Arguments in the Superior Court are scheduled for early 1999. Five years passed between the time the permittee first applied for a conditional use permit and the matter came before a court. The entire local permit process, including appeals of the various administrative decisions, has taken nearly six years. It should be noted that this is not a case of a permittee futilely attempting to use a problematic site; rather, third parties have opposed the permits. The permittee's applications have been approved and affirmed at every step of the proceedings.

20. As is demonstrated, the exhaustion of administrative remedies with respect to these types of requirements can, and does take, years, even when the permittee has been diligent. The cancellation of a construction permit, through no fault of the permittee due to third party objections, brought before the Commission or local authorities, is harsh and ripe with potential for abuse by competitors and ne'er do wells alike.²⁴ To avoid such problems, Petitioners propose that the Commission incorporate the following tolling events into proposed Section 73.3598(b)(ii):

- a. The pendency of a displacement application filed by an LPTV permittee pursuant to the Commission's DTV proceeding tolls the construction period²⁵;

²⁴ Illustrative newspaper articles regarding one local zoning battle are attached hereto as Attachment 1.

²⁵ *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order in MM Docket 87-268, 12 FCC Rcd. 14588, 14653-54 (1997); See also *Public Notice, Commission Postpones Initial Date for Filing TV Translator and Low Power TV Applications for Displacement Channels*, Mimeo No. 82914, released April 16, 1998.

- b. A fully constructed LPTV station or TV translator station operating pursuant to an STA can toll the construction period from the date of its initial STA authorizing operation;
- c. The filing of a petition to deny, objection or opposition by a third party against an assignment, transfer or modification application or the filing of an opposition or counterproposal to a rulemaking request involving the permit tolls the construction period;
- d. The pendency of a modification application filed due to the loss of a transmitter site due to denial of any local, state, or federal requirement for construction or operation of the station tolls the construction period from the date of filing of the modification application;
- e. Civil litigation directly affecting the permittee's ability to construct the station tolls the construction period (e.g., breach of contract suit pertaining to a lease on a tower site).
- f. The delays caused by the process for obtaining zoning approval, building permits, environmental authorizations and other local, state and federal requirements for construction and operation of the station will be considered tolling events, if such delay is six (6) months or longer from the date of the filing of the authorization request.
- g. Upon grant, LPTV displacement applications and major modifications will be considered new construction permits for purposes of these rules and thus, initiate a new three-year construction period from the date of grant of the displacement application²⁶;

²⁶ It should be noted that displacement applications are currently being granted 18 month construction periods.

- h. For radio and full power television stations, a modification of a construction permit for changes in an operating facility should be considered a new permit -- and given the three year construction period -- if such modification specifies a new transmitter site.

21. Petitioners request that the Commission reconsider Section 73.3598(b)(ii) and revise this section to read as follows:

- a. The grant of the permit is the subject of administrative or judicial review (i.e., petitions for reconsideration and applications for review of the grant of a construction permit pending before the Commission and any judicial appeal of any Commission action thereon);
- b. a displacement application filed by an LPTV permittee pursuant to the Commission's DTV proceeding is pending;
- c. Special Temporary Authority has been granted to a constructed LPTV station or TV translator station operating outside its authorized parameters due to the freeze on major modification applications;
- d. a petition to deny, objection or opposition was filed by a third party against an assignment, transfer or modification application or the filing of an opposition or counterproposal to a rulemaking request involving the permit;
- e. a modification application was filed due to the loss of a transmitter site due to denial of any local, state, or federal requirement for construction or operation of the station;
- f. Civil litigation directly affecting the permittee's ability to construct the station (e.g., breach of contract suit pertaining to a lease on a tower site).
- g. the process of obtaining zoning approval, building permits, environmental authorizations and other local, state and federal requirements for construction and operation of the station has exceeded 6 months from the date of the filing of the authorization request.
- h. construction is delayed by any cause of action pending before any court of competent jurisdiction relating to any necessary local, state or federal requirement for the construction or operation of the station, including any zoning or environmental requirement.

Petitioners additionally request that the following be inserted at the end of proposed Section 73.3598(a):

For purposes of this rule, applications for modification of a construction permit for changes in an operating radio or full power television facility that specify a new transmitter site will be considered new construction permits and initiate a new three-year construction period from the date of grant of the application.

For purposes of this rule, LPTV displacement applications and applications for major modifications of a construction permit for a facility will be considered new construction permits and initiate a new three-year construction period from the date of grant of the application.

These modifications of the proposed rule will eliminate the severity of the tolling provisions while maintaining strict limitations on the tolling of construction permits. In addition, the proposed modifications enhance the Commission's goals of reducing paperwork and conserving resources while ensuring prompt construction and initiation of service to the community. The interests of the permittees, the Commission and the public are thus, balanced by the inclusion of these provisions.

III. The administrative burden placed on the permittee to notify the Commission at the outset of a tolling event is contrary to the Commission's stated goals and a drain on scarce Commission resources.

22. The proposed rule provides that permittees must notify the Commission at the onset of a tolling event. Specifically, proposed Section 73.3598(c) provides: "A permittee must notify the Commission as promptly as possible and, in any event, within 30 days, of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation." 47 C.F.R. § 73.3598(c)(proposed). The Commission stated that one of its goals in this proceeding was to reduce paper work and administrative burdens on Commission permittees.²⁷ This notification procedure, in practice, will create additional paper work and require staff resources from the Commission. If a permittee encounters a tolling event, e.g. such as appeal of a building permit to a court of competent jurisdiction, that permittee must notify the Commission within thirty days of the filing of the appeal, regardless of whether the appeal will ultimately cause the permittee to not complete construction within the three year period.²⁸ Similarly, the permittee must notify the Commission by letter upon the termination of the tolling event.²⁹ Thus, the permittee must notify the Commission twice, regardless of whether they will eventually need to toll the construction

²⁷ *Streamlining Order* at ¶ 79.

²⁸ *Streamlining Order* at ¶ 86.

²⁹ *Streamlining Order* at ¶ 87.

period. This places an unnecessary reporting burden on the permittee, particularly where a permittee, knowing that its permit does not expire for a number of months or years, does not regularly communicate with FCC counsel regarding the status of the permit. It is likely that such an event will not be noted until the permit is close to expiration and they have contacted counsel. Conversely, the filing of notices that may be unnecessary to toll a construction period because a permittee completes construction within the period despite the delays, requires Commission staff to review and process the notices. In addition, valuable file space is also depleted for unnecessary notices.

23. Petitioners request that the Commission revise proposed Section 73.3598(c) to require the filing of such notices within 60 days of the expiration of the construction permit and that the notice filed include the initiation and termination dates of the tolling event. Specifically, Petitioners propose that Section 73.3598(d) be deleted and 73.3598(c) be revised as follows:

(c) A permittee must notify the Commission by letter 60 days prior to the expiration of its permit of any pertinent event covered by paragraph (b) of this section, and provide supporting documentation including the date of commencement and termination of the event covered by paragraph (b).

This proposal meets the Commission's goals: reduced paperwork and administrative burdens on both permittees and the Commission, saving the resources of both.

IV. Request for Stay of the Effective Date

24. Petitioners hereby request a stay of the effective date of the proposed revisions to Sections 73.3534, 73.3535, 73.3597, 73.3598, and 73.3599 of the Commission's Rules pending reconsideration of the *Streamlining Order*. Section 1.429(k) of the Commission's Rules provides that it may stay the effective date of an order pending reconsideration by the Commission upon a showing of "good cause." 47 C.F.R. § 1.429(k). Under *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958), as explained in *Washington*

Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)(“*Holiday Tours*”), the proponent of a stay “must demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of the stay.” *Holiday Tours, Inc.* at 842; *In re US West, Inc. Petition for Reconsideration or Waiver of Blocking and Unblocking Requirements for Transmission of Calling Party Number from Party Lines*, 11 CR 1097 (1998).

25. First, Petitioners are likely to prevail on the merits. This reconsideration requests that the Commission adopt the proposal it advanced in its NPRM, to apply the new rules to permits in their initial construction period. Therefore, it is likely that the Commission will reconsider and adopt its own previously advanced proposal. Furthermore, the Commission need not find that Petitioners’ likelihood of success on the merits is a mathematical probability if the remaining three factors strongly favor granting of the motion for stay, as they do in this case. *Hickory Tech Corp.*, 1998 FCC Lexis 3292 (July 1, 1998) at footnote 9 (citing *Holiday Tours, supra*). The strength of the other three prongs of the test clearly support Petitioners’ need for a stay of the Commission’s proposed rules, irrespective of the Petitioners’ likelihood of success.

26. Second, Petitioners will be irreparably and irreversibly injured should the proposed rules go into effect. Petitioners face automatic cancellation of their permits, which were initially granted more than three years before the effective date of the proposed rules unless they are able to demonstrate tolling of the construction permit. Cancellation of their permit terminates their ability to continue constructing and, as in the case of LPTV permittees operating under STAs, terminates their authority to broadcast. To allow the proposed rules to go into effect, thereby canceling such permits, and to, upon reconsideration, have to reinstate such permit would be an administrative atrocity for the permittees and the Commission.

27. For these reasons the public interest also favors the imposition of a stay. The Commission’s resources are much too scarce and valuable to squander reinstating construction

permits and returning to the *status quo ante* should the Commission reconsider its actions and grant the relief requested herein. In addition, the cancellation of the permits upon the effective date of the proposed rules will disrupt service to the public by those LPTV stations operating pursuant to STAs and further delay the initiation of service to the communities of license of other permittees. The public interest is best served by maintaining the *status quo* and granting the stay pending reconsideration of the proposed rules.

28. Finally, the grant of the stay will not injure other parties, but will maintain the *status quo*. Construction will not be delayed and can be completed more quickly, if the effective date of the new rules is stayed. Other interested parties are not harmed by staying the effective date of the new rules. In fact, the public interest and the Commission's resources are preserved by granting the stay.

29. The new rules will have a draconian effect on many permittees by automatically canceling their permits. This effect, coupled with the public interest benefits of permitting construction of facilities to go forward to serve communities, mandates that the Commission stay the effective date of the new rules pending reconsideration.

D. Conclusion

WHEREFORE, the premises considered, Petitioners request that the Commission reconsider Section D of the Streamlining Order, "Modifying Construction Permit Extension Procedures," and take the following actions: 1) adopt the proposal put forth in the *NPRM* applying the three year construction period to those permits currently within their initial

construction period, 2) modify the tolling provisions of proposed Section 73.3598 to allow for tolling of the construction period under additional limited circumstances, 3) modify the procedures for tolling the construction period to reduce administrative burdens on permittees and Commission resources, and 4) impose a stay on the effective date of the rule amendments in the *Streamlining Order* pending reconsideration.

Respectfully submitted,

Z-SPANISH MEDIA CORPORATION,
KNOX BROADCASTING GROUP, INC.,
JERSEY SHORE BROADCASTING CORPORATION,
CONCORD VENTURES LIMITED,
NATIONAL MINORITY T.V., INC., AND
PEGASUS BROADCAST TELEVISION, INC.

By: 

David D. Oxenford
Kathryn R. Schmeltzer
Francisco Montero
Dawn M. Sciarrino

Their Attorneys

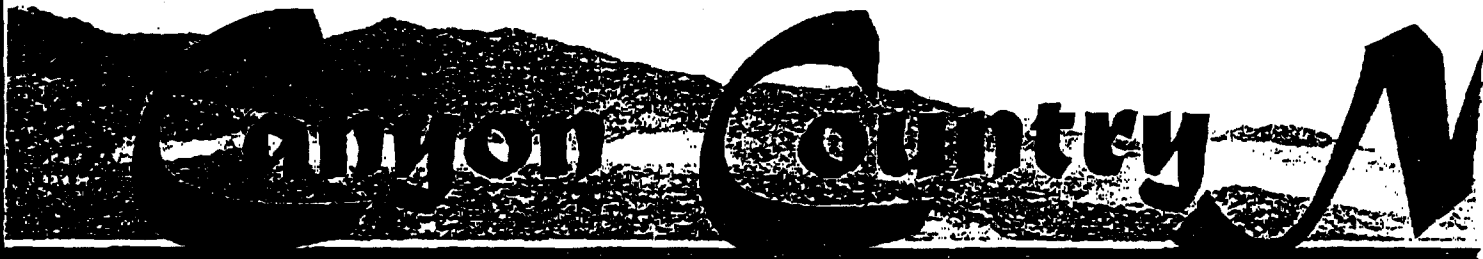
FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

Dated: January 19, 1999
J:\DATA\CLIENT\97\9700\RECONSID.DOC

ATTACHMENT 1

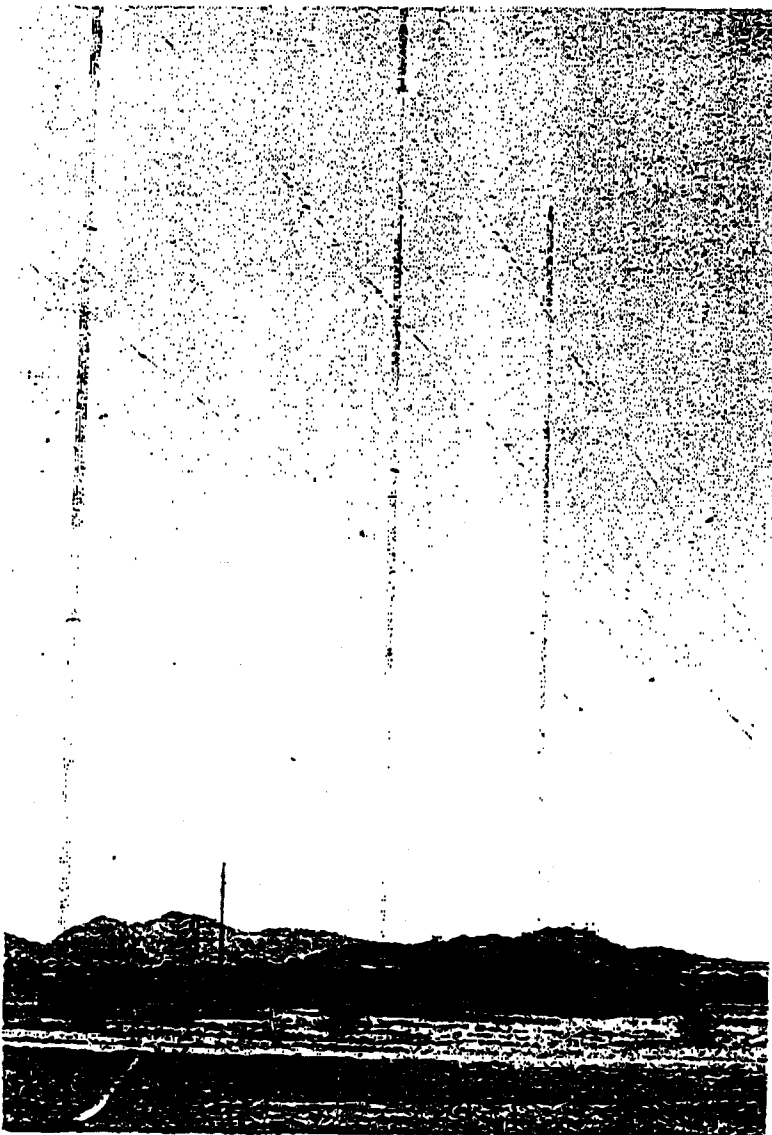
October, 1998

POSTAL PATRON PHX AZ 85027



FREE

Serving the Rural Communities in the Heart of Arizona



The above radio towers, located east of the Veterans Cemetery, were used as an illustration that towers do not destroy the ambiance of rural land. The photographer reported interference on his car radio for one and one-half miles past the tower site.

KZPZ Radio Applies for Use Permit for 7 Towers on the Kale Ranch Property in BCC

Z Spanish Radio Network, Inc. has purchased radio station KUET at Black Canyon City, and has applied to Yavapai County Planning and Building for a Use Permit to move the two existing towers and erect 5 more on the Kale Ranch, 1/2 mile south of the Maggie Mine and Old Black Canyon Hwy Intersection.

The proposed towers would be used as an AM radio station, with a Spanish speaking format. They will be 351 feet in height, and be located on an eighty (80) acre parcel of land.

Ricardo Torres, KZPZ and Engineer Lee Granlund of Z Spanish Radio Network, along with Howard Kale, met with concerned community residents on September 26th.

KUET was licensed to Black Canyon, and must remain in the vicinity to avoid interference with other AM stations. According to Granlund, the water table at this site is important as a conductor.

Concerns brought forward by residents were noise,

interference in appliances, a aesthetic consideration. Granlund said, unlike high power electric lines, there is no noise connected with radio towers other than wind blowing through the structure.

He assured residents that the FCC has ruled that radio stations have to fix the problem of interference. Filtering equipment is built into new equipment, surge suppressors will protect computers, and protect against power spikes, and also act as a filter. If an old appliance cannot be protected, Torres said the station would replace it.

Other concerns voiced by residents were that the lights (1 light on top plus 4 other lights each tower) would impact the Dark Sky ordinance. Because BCC often suffers power outages during periods of bad weather, the towers could present a hazard to the Medivac helicopters.

Pointing out that the top tower number 6 will be 12

(Continued on page 12)

Canyon Country News

October, 1998

Towers KZPZ

(Continued from page 1)

above ground level of the homes on Ridgecrest (the hill east of Old Black Canyon Hwy), the visual impact is not considered "minimal".

Anxious to cooperate with the residents, Z Spanish Radio Network has suggested that perhaps some of the water that will no longer be needed for ranching activities could be diverted to BCC Water Improvement District. They also agreed to research the possibility of fewer or shorter towers. They expressed a desire to find ways in which their business could serve the community. Grandlund said, "We hope to become a valued addition to the community as well as a good neighbor to all of you."

Another meeting with residents has been set for October 10th at 1:30 p.m. at Albins Civic Center. Ricardo Torres, KZPZ, and Lee Granlund, Director of Engineering, plan to attend to answer questions.

Planning and Zoning Commission will rule on the application at their regular meeting on October 21, 1998 beginning at 9:30 A.M., 1015 Fair Street in Prescott. It will be presented to the Board of Supervisors on November 2, 1998.

NOTICE OF PUBLIC HEARING BLACK CANYON CITY WATER IMPROVEMENT DISTRICT

The Black Canyon Water Improvement District will consider proposed changes to the security deposits for water charges of rental and owner's property. The proposed changes are as follows.

1. Rental deposits will be in the amount of \$100.00.
2. Non-Rental; Residential Property deposits will be in the amount of \$50.00. (No Change to current policy).
3. Commercial property deposits will remain as is with no changes.

The Water District Board will hold an official and legally required public hearing on the above proposed fees on Thursday, October 15, 1998 at 6:00 p.m. at the Albins Civic Center on K-Mine Road. All water users within and outside the District boundaries are invited and urged to attend.

At the conclusion of that public hearing the District Board may act and;

1. Adopt the proposed fees and charges.
2. Adopt the proposed fees in lesser amount than proposed, or
3. Take no action on the fees and/or reject the adoption of fees.

The District will provide information prior to the official public hearing listed above. Please call the District Office at (602) 374-9408 for any information (6:30 a.m. to 2:30 p.m.)

Any Person wishing to object to the proposed changes in security deposits before the date set for the hearing may file objection with the Chairman of the Board of Directors, send to:

Mr. R.T. Smith, Chairman
Black Canyon City Water Improvement District
P.O. Box 1007
Black Canyon City, AZ 85324-1007



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OLD BLACK CANYON HWY - NEW RIVER: Over 5 acres of lush desert. Parcel #1 \$27,000 (zoned

Page 8

To the Black Canyon City Community,

After being a resident of Black Canyon City and owner of the Black Canyon Ranch for 18 years, my family and I are faced with the difficult circumstance of deciding the future or fate of the ranch. The ranch operation is no longer economically viable. Multiple approaches have been made to us to develop the ranch in various ways. None of which, prior to the proposal from KZPZ Corporation, allowed my family and I and additionally the community the opportunity to have a say in the manner in which it would be used. It is the personal desire of my family and myself to preserve the horse ranch. Therefore, we have entered into an agreement with KZPZ Corporation to relocate the KUET radio transmitter operation to the Black Canyon Ranch property.

As part of the proposal from KZPZ Corporation, they have agreed in writing to maintain and enhance the character and appearance of the 76 approximate acres that front on Old Black Canyon Highway for the ability to relocate the KUET AM radio signal from the Cold Water Canyon site to the ranch property. As part of the agreement to maintain the character and ranch operation, we cooperatively wish to offer to the community access to parts of the ranch. One example would be to lease out the exercise track and re-establish the horse training operation. Another would be the ability to offer opportunities for trail rides to the saddle club. Your input with regard to an amenity that would be appropriate to the property and proposal would be welcome. As part of this proposal, my family and I will retain between 7 and 30 acres of land from the balance of the ranch property to build another home. The specifics of what could be offered to the public would require approval by Yavapai County Planning and Zoning.

Specifically, the site development for the AM radio facility would involve placing a total of (7) standard radio towers on the property. The dimensions of the towers are 24 inches in width and 351' in height. The height and size are exactly the same as the two towers currently located in Cold Water Canyon. There is a single transmitter building that would be required with the dimensions of 16'X20'x10' high. Per FAA regulations, a red navigational beacon would be placed on the top of each tower to advise air traffic. The radio facility is unmanned and does not require any community services to support its operation. Therefore, there would be no demand on water service or sewage disposal. Traffic would not increase due to standard maintenance only being conducted on a monthly to six week basis.

This proposal is not unique. Radio towers for KOOL radi were located on the Tom Chauncy ranch located in north Scottsdale for a number of years prior to its recent sale for the development of a retail center. Currently there is an equestrian center located on Pinnacle Peak Road in North Phoenix that is the site of a multiple tower radio installation. It is a good example of what we ultimately hope for the property under this proposal. It is a viable alternative that allows the preservation of a unique part of the Black Canyon City community scenery that will otherwise be lost. The ranch contributes to the distinct makeup of Black Canyon City. There are other locations that would provide acreage for a mobile home park or gravel operations, but it is doubtful that there will be another opportunity to retain a ranch of this type as an asset to the community. If it were an option to keep the ranch as it is, we would do so. The sale of the ranch is inevitable as is the corresponding change in the community composition. Although other proposals could have brought greater personal financial gain, the preservation of the ranch is of greater value. My family and I would like to ask for your support in the preservation of the horse ranch and the opportunity to have input with regard to the development that will take place on the property.

Thank you to our surrounding neighbors, to whom we felt an obligation to provide the first opportunity to discuss the proposal, for attending the meeting held at the ranch. Thank you to all that attended the meeting on September 26 and for sharing your opinions and voicing your concerns. An additional meeting to discuss the proposal has been set for October 10th at 1:30 p.m. at Albino Civic Center. Your attendance would be appreciated.

Sincerely,

Howard F. Kale, Jr. and family

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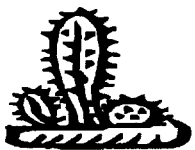
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Supervisors to hear appeal on KZFO decision

Madera County Board of Supervisors members Tuesday will hear an appeal of the Madera County Planning Commission's decision to approve a height variance for KZFO Broadcasting Inc.

The appeal will be part of the board's regular meeting. The meeting will begin at 9 a.m., and the appeal will be heard at 10:30 a.m.

The meeting will be held in the supervisors chambers in the Madera County Government Center, located at 209 W. Yosemite Ave. in Madera.

The hearing will be based on an appeal by Baker, Manock and Jensen, a legal firm representing Triple "R" Ranch, S&J Ranch and Apache Grove Land Programs from the planning commission's decision to approve the height variance at Avenue 9 and Road 39 in southern Madera.

The commission granted a height variance to allow a 500-foot tower to hold radio antennas and other communications equipment. The property is owned by Ben Coulthard and is located on the northwesterly corner of the intersection of Avenue 9 and Road 39.

The area is zoned agricultural, rural and Exclusive-40 Acres. Denial of a height variance declaration is also being appealed.

The letter of appeal states that the tower will be a permanent eyesore and will pose a threat to low-flying aircraft (jet, glider and other aircraft used in support of farming operations and medical helicopter transport).

The radio programs are developed in Sacramento and sent by satellite to Fresno for rebroadcast.

ing, therefore no jobs are generated in Madera County, the letter said.

Also, the attorneys state that required findings of fact cannot be met.

According to the county Planning Department's staff report, approximately 5.8 acres of the total 154.79-acre parcel will be needed for the project. Impacts to the existing agricultural activities on the property (almonds and vineyard rows) will be minimized by limiting the fencing of the site to only that area immediately surrounding the building, tower and guy anchor points.

Project fencing will consist of a six-foot chain-link fence surrounding the perimeter of the structures.

If approved, the proposed tower at 500 feet would represent the tallest structure (radio tower) approved by the county to date. Height variances for three communications towers have previously been approved in the general vicinity of the subject property, the report said.

Madera County has approved 28 height variance requests for radio or cellular communications towers since 1977. Of those, five have been radio communication and/or broadcast towers.

The planning commission found that the proposed facility is not feasible without the granting of the variance.

There are no areas where such a variance would not be required, nor are there other radio towers or structures in the area on which the applicant's antennas could be located and adequately serve the applicant's needs, the commission added.

2 — Madera Tribune Monday, July 8, 1998

NEWS/FEATURES

County planners to discuss request to build radio tower

Company wants commissioners to allow a height variance for an antenna tower

BY ROBERT ADAMS
City Editor

BASS LAKE — Madera County Planning Commissioners will again take up the issue of a height variance being asked for by KZFO Broadcasting Inc.

The company is asking for a variance that would allow it to build a 500-foot tower to hold radio antenna and other communications equipment.

The matter was continued from both the June 19 and June 23 planning commission meetings.

Discussions will be held in a different location than the last time the matter was on the agenda, however, as Tuesday's meeting will be held at the Madera County Moun-

tain Government Center located at 40601 Road 274 in Bass Lake. The meeting will being at 7 p.m.

The KZFO item was continued by the commission on June 19 after commissioners requested they receive additional information concerning the visual impact of the proposal on the immediate area.

The applicant was unable to get the necessary photo simulations in time for the June 23 meeting, so the item was continued at the applicant's request.

The proposed radio facility is located on a nearly 159-acre parcel designated for agricultural land uses. The land is located on the northwesterly corner of the intersection at Avenue 9 and Road 39 in Madera, and is owned by Ben Coulthard.

The proposed tower would be located near two proposed developments, the approved Gunner Ranch West, Valley Children's Hospital Area Plan; and the Village of Gateway, which is currently still in the process of having its application processed.

Within Madera County, similar structures have been approved with a variance to the height requirements of the zoning ordinance. According to the Madera County Planning Department, such facilities may present a co-location opportunity in certain instances for carriers of other types of communications technologies, such as cellular communications systems.

Valley Children's Hospital expressed opposition to the proposed facility based on a perceived hazard to incoming emergency helicopters and potential aesthetic impacts to the facility. Hospital staff also indicated that the safety of these helicopters might be compromised, especially in cloudy or foggy conditions, by the addition of a 500-foot-high radio tower, as well as having a negative visual impact on patients entering and exiting the facility or utilizing the west wing of the hospital.

Hospital representatives have requested that the tower be relocated to a site five miles from the hospital.

PRESCOTT COURIER

WEDNESDAY, JANUARY 6, 1999

FRONT PAGE / LOCAL SECTION

Supervisors OK towers despite opposition from residents of Black Canyon City

By JUANNA DODDER
The Daily Courier

PRESCOTT - Which is better, homes or radio towers?

That was the crux of the argument on both sides during a Yavapai County Board of Supervisors hearing Monday.

The supervisors decided the towers are better. They granted a special use permit for a cluster of seven AM radio towers at Black Canyon City.

Thirteen speakers and 543 people who signed petitions disagreed the towers are better.

The county planning commission also disagreed, albeit narrowly. Its recommendation for denial came on a 3-2 vote. Commissioner Jim Buchanan cited a lack of community support as one of his major reasons for offering a motion to deny the permit. Commission Chair Diane Lovett said the application doesn't follow the community plan and doesn't match existing residential zoning.

Jim Musgrove, attorney for the applicant, KZPZ radio, said the planning commission's denial appeared to have a lot to do with the popularity of the towers, so the applicant gathered 313 signatures on supporting petitions to counteract the 543 signatures on opposition petitions.

The company also sent validation cards to the 543 people who signed the petitions, and asked them to return the cards. The post

office returned 104 as undeliverable, he said.

But opposition took offense to Musgrove's allusion that the petition drive was tainted. They said many property owners don't live permanently at their Black Canyon City addresses, and at least one person at the hearing confirmed this was correct in his case. He said he bought the property as a future retirement home.

After a three-hour hearing, the supervisors placed several extra stipulations on the permit to cover concerns some residents expressed.

The applicant also sweetened the offer with a \$50,000 contribution toward developing a five-acre parcel it already had committed to give the county for a park.

Black Canyon resident Fay Welch said "a lot of people are getting excited" about the \$50,000 and have changed their minds to support the project.

"The issue here is change, and how we protect the integrity of the community," said Supervisor Bill Feldmeier, whose district includes Black Canyon City along the southern edge of the county. "I see no direct harm in these radio towers."

So often the supervisors have no opportunity to inspect the change that comes with growth, and this is a chance to have that impact, Feldmeier said. Accompanying the tower approval was a commitment not to build homes on the surrounding 71 acres; the owner has

the right to construct up to 35.

Supervisor Gerald Brownlow noted these homes could develop as 2-acre lot splits without county approval, something the supervisors generally oppose.

The current owner of the Black Canyon Ranch, Howard Kale, will keep 91 acres of the 162-acre ranch. He told commissioners he couldn't afford to keep the horse ranch running, and he might put in homes or a gravel pit without the towers approval.

The sale to Ricardo Torres for the radio station "allows the ranch to live - otherwise it's going to die," Kale told the crowd of more than 60 people Monday. "We're trying to give a little back and create a park."

"This becomes an emotional situation - it also becomes a value judgment," he said.

Several of the 11 people who spoke in favor of the permit said they much prefer a view of towers over rooftops. Barbara Sanders said even opponents won't notice the towers after a month or so. The county stipulations said the towers can't have lights or reflective paint. The applicant had reduced the towers' proposed height below 200 feet so they didn't need lights per Federal Aviation Administration rules.

Supporters also said the towers would have less effect on the environment than homes, which could come with dozens of septic tanks.

But opponents said the 197-foot

towers will block their view of the Bradshaw Mountains, unlike homes which would be much lower in elevation.

Opponents also said they already have a park, and they have enough water, too (the radio station has offered the local water company use of its wells). Others worried about who would take care of the creek crossing to the park, and about potential radio tower interference with their phones and TVs.

"I just think that it's a come-on to tickle our feathers," resident Elizabeth Gardner said of the park.

Supervisors tried to reduce some of the concerns with the stipulations attached to their approval. The owners agreed to maintain a creek crossing leading to the park, and agreed to fix any phone or TV problems by sending an engineer to check out complaints and installing filters to solve legitimate problems.

Ironically, Feldmeier hosted one of his monthly rural meetings in Black Canyon City Monday night, so he may have heard even more feedback on his decision.

"The ones that are happy (with the supervisors' decision) will be home watching the (college football championship) game," Feldmeier predicted en route to Black Canyon City Monday night. Those that are mad, however, will probably come to the meeting, he said.

He joked that Yavapai County Sheriff Buck Buchanan would be there to protect him.

TOTAL P.02